LAU KAH DING & SONS SDN BHD

v.

TAMASA DEVELOPMENT SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[SUIT NO: 22-128-1999-II]
18 MAY 2001

CIVIL PROCEDURE: *Summary judgment - Triable issues - Strata title of land yet to be obtained - Lodgment of caveat - Locus standi/cause of action - Whether qualify as defences on merit of triable issues - Rules of the High Court 1980, O. 81 r. 1(a)*

CIVIL PROCEDURE: *Specific performance - Agreement for sale of land - Whether specific performance should be granted*

Pursuant to O. 81 r. 1(a) of the Rules of the High Court 1980, the plaintiff applied for, *inter alia*, specific performance of a sale and purchase agreement which was for the purchase of a private sublot of a piece of land together with a four-storey shophouse to be constructed thereon ('the property') from the defendant. In opposing this application, the defendant claimed the following defences: (i) that strata title for the property lots of the said piece of land were still being applied; (ii) breach of the agreement in that the plaintiff, their assignees and charges caused a caveat to be lodged; and (iii) that the plaintiff was not the proper party to institute this action.

Held:

[1] It appeared that the defendant had not diligently applied for the issuance of the strata title from the relevant authority to enable a transfer of the title to the plaintiff; thereby rendering that issue irrelevant.

[2] The bank which financed the purchase of the property, lodged the caveat to protect their interest when the document of title and memorandum of transfer of the property were not forthcoming as promised by the defendant. The defendant knew it was at fault and chose not to protest to the caveat lodged. The defendant also failed to show how the caveat lodged would prejudice the application for the title to the property. Hence, lodgment of the caveat was not an issue.

[3] In consideration of a loan facility, the plaintiff had assigned absolutely all its rights and interests to the property to the bank, by way of a deed of assignment. When this suit was filed in 1999, the deed of assignment which was executed in 1983 was already fully discharged in 1994; and all the benefits and interests accruing thereunder were reassigned back to

the plaintiff. Thus, the plaintiff was competent to maintain this action. It followed, therefore, that the defences herein had failed to raise any triable issues.

[Plaintiff's application allowed with taxed costs.]

Case(s) referred to:

Alloy Automative Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 ***(refd)***

Christina Angelina William Bastian & Anor v. Newacres Sdn Bhd [1996] 2 BLJ 509 ***(dist)***

Esso Standard Malaya Bhd v. Southern Cross Airways (M) Bhd [1972] 1 MLJ 168 ***(foll)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 ***(dist)***

Vijaya Raghavan & Ors v. Tamasa Development Sdn Bhd (Suit No: 22-108-98-III/II) (unreported) ***(dist)***

Legislation referred to:

Civil Law Act, s. 4(3)

Rules of the High Court 1980, O. 14, O. 81 rr. 1(a), 3

For the plaintiff - Stanley Eddy; M/s Battenberg & Talma

For the defendant - Leslie Chiew Vun Fu; M/s Chew Jugah Wan Ullok & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Zakaria Sam JC:

The Background

The plaintiff and defendant are companies incorporated in Malaysia under the Companies Act 1965, having a place of business in Sibu and Kuching, Sarawak respectively.

The defendant is the developer of 48 units of 4-storey shophouse on Lot 266 section 48, Kuching Town Land District (KTLD).

By a sale and purchase agreement dated 15 December 1980, the defendant agreed to sell and the plaintiff to purchase private Lot 36, one of the several sublots of the said land together with a 4-storey shophouse to be constructed thereon for RM600,000. This parent title of Lot 266 Section 48 KTLD had been sub-divided into several lots and one of the said lots is Lot 281 Section 48 KTLD, where the 4-storey shophouse in question is situated.

Clause 4 of the said agreement stipulated that the defendant should complete the said shophouse within 36 months from the date of the said agreement and in the event of failure to complete, the defendant shall pay to the plaintiff as agreed liquidated damages RM500 per month.

The plaintiff had paid full purchase price and the final instalment was made on or about 1 October 1984.

By cl. 8 of the said agreement, upon payment of the final instalment of the purchase price under cl. 2(ix), the defendant shall simultaneously execute a registrable memorandum of transfer of the said shophouse to the plaintiff free from all encumbrances and deliver to the plaintiff vacant possession of the same.

Under cl. 12(3) the defendant further covenanted that the memorandum of transfer shall be completed at the office of the defendant's solicitor within 14 days after receipt of the defendant's notice of completion by the plaintiff. Upon completion of the shophouse, the defendant shall also and execute in favour of the plaintiff a transfer of the subsidiary title to the said shophouse free from all encumbrances and with vacant possession.

Apart from giving possession sometimes in September/October 1984, to date the defendant has not executed the memorandum of transfer and deliver the title to the plaintiff.

After a long lapse of about 15 years and numerous unsuccessful attempts to get hold of the documents, the plaintiff finally took out this suit for, *inter alia*, the following reliefs:

i) Specific performance of the sale and purchase agreement dated 15 December 1980;

ii) An order that the defendant to effect the transfer of the title to the said shophouse to the plaintiff free from all encumbrances, failing which the defendant to refund to the plaintiff the sum of RM600,000 being the purchase price the plaintiff had paid and the said sale and purchase agreement to be deemed to be cancelled and annulled:

iii) Agreed liquidated damages at RM500 per month from 15 December 1983 to date of completion; and

iv) Alternatively, damages in addition to or in place of specific performance.

The Present Application

By a summons-in-chambers dated 23 August 1999 the plaintiff is applying for an order pursuant to O. 81 r. 1(a) of the Rules of the High Court 1980 (RHC), for specific performance of the agreement dated 15 December 1980 and for damages and costs with the minutes of order attached to the application.

In opposing this application the defendant claims that it has a *bona fide* and reasonable defence to the plaintiff's suit. The defendant raised the following contentions for the consideration of this court:

i) Strata title are being applied, cl. 12 of the said agreement applies and notice to complete has yet to be issued;

ii) The power to issue strata title is with the government agency, can specific performance be ordered against the defendant though no fault of theirs;

iii) Breach of cl. 15 of the said agreement in that the plaintiff, their assignees and charges caused a caveat to be lodged;

iv) The plaintiff, having assigned all their rights and interests under the deed of assignment dated 18 January 1983 to Hock Hua Bank, has no *locus standi* and/or cause of action; and

v) Failure to pay its shares of the electricity and water charges under cl. 19 of the said agreement.

The Affidavits

The plaintiff's application is supported by the three affidavits of Lau Kah Ding, a director of the plaintiff, affirmed on 20 August 1999 (encl. 17), 22 September 1999 (encl. 24) and 25 September 1999 (encl. 26). The defendant in turn filed two affidavits-in-opposition by Stanley Lingoh Gara, manager of the defendant, affirmed on 10 September 1999 (encl. 22) and 7 October 1999 (encl. 28).

The Law

The scope of O. 81 of RHC as explained in the Malaysian High Court Practice, 1988 is that:

> This order provides a procedure similar to O. 14 and enables a plaintiff, where there is no triable defence to the action, to obtain summary judgment in an action for specific performance of a contract (irrespective of whether it is in writing) for the sale and purchase of land without having to proceed to a full trial. (at page 5301).

And O. 81 r. 3 of RHC provides:

> Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action.

In *Alloy Automative Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382 the Federal Court held that summary judgment conferred by O. 81 provides a procedure similar to O. 14 and must be used with great care.

Now I will examine the affidavits evidence of both parties to determine whether this is a plain case which ought not to go for trial or otherwise.

The Findings

The Issuance of Strata Title

Issues No. 1 and 2 raised by the defendant are to be taken together. The plaintiff's alleged that the defendant had breached cl. 8 of the sale and purchase agreement by failing to secure a separate document of title to the shophouse and as well as delivering a duly executed registrable memorandum of transfer in respect of the said shophouse to him, free from all encumbrances.

In reply, the defendant contended that the sale and purchase agreement has not been completed and as such the company is not obliged to hand over the shophouse to the plaintiff, free from all encumbrances. In this context, the defendant relied on cl. 12(3) of the agreement which reads;

> Notwithstanding Clause 8 hereof, the contract shall be completed at the office of the Vendor's solicitors, Messrs. Chan, Jugah, Wan Ullok & Co., Kuching, within fourteen (14) days after receipt of the Vendor's Notice to Complete by the Purchase. On the completion, the Vendor shall make and execute to the Purchaser a transfer of the subsidiary titles of the 4 floors of the said shophouse free from all encumbrances and with vacant possession. The expenses, including the legal fees and stamp duty of such transfer, shall be borne equally by both parties hereto.

Even though vacant possession to the said shophouse had already been handed over to the plaintiff, the defendant contended that the said sale and purchase agreement has not been completed as the defendant is yet to issue the vendor's notice to complete. They are still in the midst of applying for strata title over the individual lots to the Lot 281 section 48 KTLD.

In my judgment, cl. 12(3) is not unfettered. It must be read together with cls. 10 and 12(2), which provide:

Clause 10:

> Time wherever mentioned shall be of the essence of this agreement.

Clause 12(2):

> The Vendor shall, at its own cost, obtain subsidiary titles for the 4 floors of the said shophouse on being informed by the Kuching Land Office, in writing, that the 4 floors of the said shophouse may be dealt with under the Strata Titles Ordinance, 1974.

The pertinent question here is, what actions or steps that had been taken by the defendant to fulfill its duties under cls. 12(2) and (3) of the agreement ie, to secure the issue of the title.

It seemed the defendant took the initial action to secure the strata title only on 5 February 1987 when the relevant documents were submitted to Penguasa Tanah & Ukur, Bahagian Pertama Kuching for approval (see the exh. SLG 1 to encl. 22). When queried by the plaintiff about the titles, the defendant in its reply dated 9 October 1991 (see exh. LKD 10 to encl. 24), informed the plaintiff that the strata title was expected to be released by the end of the year, ie, 1991. Surprisingly, on 19 February 1998, the defendant's through its consultant had sent additional documents to Pengurus Tanah & Survei, Jabatan Tanah & Survei, Kuching, which were not included in the earlier application (*vide* encl. 22). There is no explanation as to the delay of 11 years for the defendant to submit the additional documents.

When queried further by the plaintiff *vide* letter dated 22 March 1999 (see exh. LKD 3 to encl. 17) about the delay, the lawyer for defendant replied that, "Our client instructed us that they are currently in the midst of applying for the individual strata title for Lot 266, Section 48 KTLD. To date, the Land & Survey Department has not yet released the individual strata titles for the said property." (see exh. LKD 4 to encl. 17).

It is beyond doubt that the cause of the delay in the issuance of the strata title lies with the defendant and not because of any incompetence on the part of the Land and Survey Department, Kuching. There is no evidence to show that the relevant authority was slow in issuing the certificate of title.

The application for the strata title should have been submitted as early as 1983, but was only put up in 1987. Even then, the documents submitted were incomplete. It is abundantly clear that no Land and Survey Department would act on an incomplete application. An incomplete application tantamounts to no application at all. The burden is on the defendant to submit a complete application for strata title before the relevant authority could act on it.

It is clear from the evidence that the defendant over a period of 20 years and having collected the full purchase price, have not diligently applied for the issuance of the strata title from the relevant authority to enable a transfer of the title to the plaintiff. They have stretched the interpretation of cl. 12(3) beyond its limit.

It is my finding that the defendant is solely to blame for this long delay. They have no respect for cl. 10 of the sale and purchase agreement which stipulated that time is of the essence to this agreement. In the circumstances, the second issue raised by the defendant is no more relevant.

Breach Of Clause 15/Caveat Lodged

This should not be a cause of complaint by the defendant. The loan agreement and the deed of assignment which the plaintiff had signed with Hock Hua Bank were within the knowledge of the defendant. The defendant by their letter

of consent to the assignment (see exh. SLG 11 to encl. 22), had given their undertakings to deliver to the bank the separate documents of title, free from all encumbrances, together with the memorandum of transfer duly executed in respect of the said shophouse.

It is to be noted that even though the deed of assignment was executed on 18 January 1983, the caveat was only lodged by the bank on 11 July 1989 *vide* Instrument No. L8399/1989 (see para. 14 of statement of defence).

It was only prudent for the bank to lodge the caveat to protect their interests when the document of title and the memorandum of transfer were not forthcoming as promised by the defendant. The defendant knew it was at fault and chose not to protest to the caveat being lodged. The defendant also failed to show as to how the caveat lodged would prejudice the application for the title to the shophouse. Therefore the lodgments of the caveat is not an issue here.

As a matter of fact, it was the defendant who had breached its duties to deliver the memorandum of transfer and title to the plaintiff free from all encumbrances. The defendant on its own had charged the said land to a bank to secure a loan of RM8.7 million and had caused numerous caveats lodged on the said land currently.

Issue Of *Locus Standi*

It is the defendant's contention that the plaintiff is not the proper party to institute this action. The plaintiff had on 18 January 1983 absolutely assigned all its rights and interests to the said shophouse to Hock Hua Bank Bhd, by way of a deed of assignment, (see exh. SLG 11 to encl. 22) in consideration of a loan facility given by the said bank to finance the purchase of the said shophouse. As the plaintiff had already assigned all their rights and interests in the said shophouse to the bank under the said deed, the plaintiff has no *locus standi* or right to institute this action against the defendant. Beside s. 4(3) of the Civil Law Act, the learned counsel for defendant cited *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56, *Christina Angelina a/p William Bastian & Anor v. Newacres Sdn Bhd* [1996] 2 BLJ 509 and *Vijaya Raghavan & 2 Ors v. Tamasa Development Sdn Bhd* Suit No. 22-108-98-III/II (unreported), to back his argument.

Upon perusing all the three authorities, I found the facts of these cases are distinguishable from the case before me. In *Nouvau Mont*'s case, the deed of assignment was signed on 18 February 1978 and the proceeding was commenced on 17 November 1982. The said deed was only revoked on 21 April 1983. The Federal Court held that the deed of assignment was an absolute assignment (not purporting to be by way of charge only) within the meaning of s. 4(3) of the Civil Law Act, and since it was not revoked when the suit was filed the appellant was not competent to maintain the action.

In *Christina Angelina*'s case the only issue involved was whether the assignment was absolute or not. I assume the deed, which was executed on 15 June 1983, was still effective when the suit was filed in the lower court. *Vijaya Raghavan*'s case also involved the same issue as *Christina Angelina*'s case. It is clear that these two cases do not involve the issue of revocation of the deeds.

In the present application when the suit was filed on 26 June 1999, the deed of assignment which was executed on 18 January 1983 was already fully discharged on 10 October 1994 and all the benefits and interests accruing thereunder whatsoever were reassigned back to the plaintiff (see exh. LKD 12 to encl. 26).

I therefore rule that the plaintiff is competent to maintain this action.

Failure Of The Plaintiff To Pay The Electricity And Water Charges

This is a trivial matter for the defendant to take it up as an issue in view of the defendant's own fault in this action.

It was not a blatant conduct of the plaintiff in refusing to pay. Enquiries were made as to why the charges were very high. Furthermore, when the plaintiff receive request for the payment, they sensed that there would be a delay in the completion of the said shophouse (see exh. LKD 9 of encl. 24). In any event, the plaintiff had made the payment in June 1984.

The defendant also failed to show that the delay of a few months in the charges payment had affected or caused delay on the part of the defendant to complete the said agreement. Furthermore, this was not pleaded in the defence.

Conclusion

Here, I wish to quote the decision of Raja Azlan Shah J (as his Majesty then was), in *Esso Standard Malaya Bhd v. Southern Cross Airways (M) Bhd* [1972] 1 MLJ 168 at p. 171:

> It is I think right that an order under RSC Order 14 should be made only if the court thinks it is a plain case and ought not to go to trial. If one simply has a short matter of construction with a few documents, the court on summary application should decide what in its judgment is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed.

I am satisfied that the affidavits and defence filed herein failed to raise any triable issue and I have no doubt that the plaintiff is entitled to judgment.

Upon the foregoing reasons, I allow the plaintiff's application with costs to the plaintiff to be taxed unless agreed.